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論

說

極 窮 權 論 考

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一

「一ノ謬レル說ハ等シク謬レル反對說ニヨリテ驅逐セラル、ヲ常トス。中間ニ存スル眞理ノ見出サル、ハ遙カニ後ノコトナリ。是レ學問(智識)ノ運命ナリ。國家ハ人類ノ一切ノ事項ニ就テノ無制限ナル後見者ニシテ、國家ハ人間ヲ幸福ニ、豐富ニ、健康ニ、信念正シク、有德ニ、而シテ又——神ノ旨ニ從ヒ——永久ニ幸福ナラシム可キモノナリトノ說ハ今日既ニ打破シ得テ餘リアリ。然ルニ予ヲ以テ見レバ論旨ハマタ反對ノ極ニ走リテ、國家ノ義務ト權利トヲ餘リニ狹ク限局シタルモノ

ノ如シ。國家ハ唯ダ各箇人ニ其人格權ト其所有トヲ維持シ且ツ保護スルノ外ナ
ス可キコトナシトノ論ハ必ズシモ誤謬ニ非ズシテ良キ意味ヲ有スルコトナリ。
唯ダ此論ノ根柢ニ暗黙ノ内ニ次ノ如キ前提ノ置カル、コト屢ナルヲ不可ナリト
ス。曰ク所有ハ國家ヨリ獨立シテ起ル、故ニ國家ハ其臣民ガ既存スル所有ノ狀態
ヲ其儘ニ認ム可キモノニシテ、其所有收得ノ法律的根據如何ヲ問フヲ要セズト、
予ハ此種ノ論說ニ反對シテ云ハントス。國家ノ任務ハ各箇人ニ其分ヲ與ヘ、各箇
人ヲシテ先ヅ各其所有ヲ收得セシメ而シテ後之ヲ保護スルコト是レナリト。

(Jedem erst das Seinige zu geben, ihm in sein Eigentum erst einzusetzen, und sodann erst, ihn
dabei zu schützen.) (略中) 所有ナルモノハ明記セラレタル契約ヨリノミ起ルモノナリ
契約アリテ初メテ或ル特定ノ物ニ對スル優占權、排他權ハ生ズルナリ。元來萬人
ハ總テノモノニ對シテ同一ノ權ヲ有スルモノナリ、換言スレバ誰人ト雖モ他人ニ
優占スル何等ノ權利ヲモ有スルモノニ非ズ。唯ダ或一定ノ物ニ對シ他ノ凡テノ
人ガ其有スル權利ヲ拋棄スルニヨリテ——予ガ其物ヲ我物トシテ保留セントノ
欲求ノ結果トシテ——其特定物ハ予ノ所有トナル。即チ他人ノ權利拋棄——而
シテ之ノミ——ガ予ノ權源タルナリ(略中) 所有權ハ行爲ニ對スル排他權ナリ、物ニ

對スル排他權ニ非ズ(以下略)「サレバ自由行為ノ範圍ハ萬人ト萬人トノ契約ニヨリテ各人間ニ分配セラレ、此分配ニヨリテ所有ハ發生ス。然ラバ此分配ヲ適法ナラシメンニハ之ヲ如何ニ爲ス可キカ、或ハ又タ此分配ハ唯ダ自ラ定ムル儘ニ放任スルヲ以テ足レリトスルカ、(略)人間一切ノ行為ノ目的ハ是レナリ、曰ク生活シ得ルコト。生活ノ可能性ハ自然ニヨリテ人生ニ置カレタルモノニシテ、此可能性ニ對シテハ萬人ハ悉ク同一ノ權利ヲ有ス。乃チ知ル、上述ノ分配ナルモノハ、先ヅ第一ニ萬人ガ之ニヨリテ生存シ得ル様ニ爲サレザル可カラザルコトヲ。活キヨ而シテ活カシメヨ！

各人ハ出來ル限り安易ニ生活センコトヲ欲ス。而シテ此一事ハ各人ガ一個ノ人間トシテ要求スル處ニシテ、或人ハヨリ多ク人間タリ、或人ハヨリ少ク人間タリト云フコト有ルノ理ナケレバ、此要求ニ於テハ萬人ハ皆同一ノ權利ヲ有スルモノナリ。此ノ權利ノ平等ニ基イテ分配ヲ爲スヲ要ス。此ニヨリテ生存スル限りノ人數ガ存在スル限りノ活動範圍ニ於テ相並立シテ生存シ、各人ガ出來得ル限り安易ニ生活シ得ル様ナラザル可カラズ。換言スレバ萬人ハ粗ボ同一様ニ安易ナル生活ヲ營ミ得ルモノナラザル可カラザルナリ。(中略)各人ニ歸着スル一部分ハ適法

ニ其人ノ所有ナリ。現ニ與ヘラレズトモ、彼ハ必ズ其分ハ之ヲ享ク可キモノナリ。理性國家ニ於テハ、彼ハ必ズ之ヲ享ク可シ。理性ノ覺醒ト支配トガ偶然ト暴力トニヨリテ左右セラル、分配狀態ニ於テハ、各人ハ必ズシモ其分ヲ享クル能ハズシテ、或人ハ其分以上ノモノヲ壟斷スルコトアル可シ。人爲ニヨリテ理性ニ近接シツ、アル現實ノ國家ノ標的ハ各人ニ漸次ニ上述ノ意味ニ於ケル其分ヲ得セシムルコトニ存セザル可カラズ。是レ予ガ國家ノ任務ハ各人ニ其分ヲ與フルニ在リト云フ所以ナリ。』(Johann Gottlieb Fichte, Der geschlossene Handelsstaat 1800, Augsburg: Reclam, SS. 15-19.)

是レ十九世紀ノ第一年ニ於テ大哲學者フイヒテガ其理性國ノ理想ヲ説キ而シテ此理想ニ近ヅカンガ爲メニ「鎖封的商業國」論ヲ提唱セル根本主張ナリ。彼ガ鎖國論ハ往々ニシテ一片空想ト看做サレ其ノ考究ニ力ヲ用ユルノ價值ナキモノトセラル。然ルニ百十八年ヲ閱シテ後ノ今日彼ガ第一ニ其採用ヲ期待シタル普魯西國ハ、勿論爾餘ノ歐米ノ文明國ニ至ルマデ殆ンド一ノ取除ナク事實ニ於テフイヒテガ要求セル「鎖封的商業國」ノ實ヲ示シツ、アルナリ。然リ鎖國ノ實ニ至ツテハ一ナリ而モ其原因ニ至ツテハ彼此全ク相異ル。フイヒテハ安易ナル生活ノ保障、予ノ造語ヲ以テスレバ、生存權承認ヲ第一義トスル理性國家ノ實現ノ爲ニ、鎖國

ヲ要求シタリ。今日ノ歐米諸國ノ鎖國ニ至ツテハ全ク之レニ異リ、唯交戰ノ必要
ノ爲メニ、換言スレバ生命ノ破壞ノ爲メニ鎖國ヲ實行シツ、アルナリ。フイヒテ
ガ第一義トシタル生存ノ保障安易ナル生活ノ維持、各人ニ各其分ヲ享有セシムル
コトノ如キハ、今日ニ於テハ、世界ノ平和、人類ノ解放、デモクラシーヲ興シテ、オート
クラシーヲ滅ス等ノ虚言作辭ノ爲ニ全ク犠牲ニ供セラレアリ。知ラズフイヒテ
ヲ地下ヨリ起シテ此狀態ヲ目撃セシムルトキハ、果シテ如何ノ言ヲ爲ス可キヤ。
各國ノ現状ハ此クノ如シ、然レドモフイヒテガ其國家哲學ノ出立點トシタル生存
保障ノ要求ハ此ノ狀態ノ下ニ全ク死滅シタルニハ非ズ。交戰國ノ政治家ガ之ヲ
忘却スルコトハ一事ナリ、人類ノ根本要求モイ、消長ハ他事ナリ。如何ニ人道
ヲ標榜シ、如何ニ民主主義最後ノ勝利ヲ高唱ストモ、其ハ生存保障ノ破壞ヲ正當付
クルコトハ能ハズ。理性的ナル生存權ノ要求ガ坦々タル大道ヲ濶歩スルコトヲ
許サレザレバ、自ラ茲ニ變通ノ權道ヲ見出スコトヲ免ガレズ。予ガ今名ケテ極窮
權 (Right of extreme need; right of extreme necessity) ト云フモノ即チ其一ナラズンバ
ラズ。

二

生命財産ノ保護ハ文明國家ノ第一義トスル所ナリトハ道學先生ノ常ニ說ク所
薩摩字書ニ縋リテミル、スベンサーヲ誤讀曲譯シツ、アリタル明治初年ノ我英學
諸先生ノ金科玉條トシテ說クヲ絶タザル所否今日ニ在リテモ未ダ多數ノ低能學
者ノ崇奉スル所ノ理屈ナリ。生命アルモノ、生命ヲ保護シ、財産ヲ有スルモノ、
財産ヲ保護スルハ必要事タルコト誰人モ之ヲ拒ム能ハズ。然レドモ生命ハ如何
ニシテ維持セラレ、財産ハ如何ニシテ收得セラルハヤ。唯ダ有ルモノハ凡テ皆神
聖ナリトシテ之ヲ保障スルトシテモ、生命ヲ維持ス可キ保障、財産ヲ收得シ得可キ
保障ハ如何ニシテ與ヘラルハヤ。論者答ヘテ曰ク、其ハ私事ナリ、各人ノ任意事項
ナリ、國家ノ取ツテ任トス可キ所ノモノニ非ズト。勞働シテ生命維持ノ資料ヲ得
ヨ、得タル資料ハ之ヲ節約シテ、財産ヲ造レ、勞働ハ神聖ナリ、勞働成果ノ節約セラレ
蓄積セラレタル財産ハ更ニ神聖ナリ。此最神聖ナルモノ、保護是レ、國家ノ自ラ
任ズル所ナリ。多ク働ケ而シテ少ク食ヘ是レ、各人最高ノ義務ナリ。此義務ヲ遵
行スルモノハ即チ國家ノ保護ヲ受ケン。働ク機會、食フ資料ヲ與フルハ國家ニ期

待ス可キコトニ非ズト。

三

極窮論ノ主張者等モ亦以上ノ理屈ヲ前提トシテ立論スルモノナリ。唯ダ「多ク働キ而シテ少ク食ヒ」テ猶且ツ生命ヲ維持シ得ザル場合ニノミ就テ其論ヲ構フ。現時ノ歐米諸國多クハ此狀態ニ在リ、而シテ今ヨリ一世紀前ノ英國ニ於テモ亦多ク然リキ。

極窮論ニ明細ナル定義ヲ與ヘタル第一人者ハ恐ラク英國ノ道德哲學者ヘーレ其人ナル可シ。彼千七百八十五年開版ノ其「道德政治哲學」ニ於テ云ツテ曰ク、

Another right, which may be called a general right, as it is incidental to every man, who is in a situation to claim it, is the right of extreme necessity; by which is meant a right to use or destroy another's property, when it is necessary for own preservation to do so; so a right to take, without or against the owner's leave, the first food, cloths or shelter we meet with, when we are in danger of perishing through want of them; a right to throw goods overboard, to save the ship; or to pull down a house, in order to stop the progress of fire;

and a few other instances of the same kind. (*Paley*, Moral and political Philosophy. 1785.

Vol. 2 p. 73.)

而シテ彼ハ其法理的根據ヲ論シテ曰ク、

Of which right the foundation seems to be this: that when property was first instituted, the institution was not intended to operate to the destruction of any; therefore, when such consequences would follow, all regard to it is superseded.

又タ他ノ證據ヲ揣摩スリテ、

Or rather, perhaps, these are the few cases, where the particular consequence exceeds the general consequence; where the remote mischief resulting from the violation of the general rule, is overbalanced by the immediate advantage. loc. cit.

彼ハ極窮論ノ發動ヲ喜ブモノニ非ズ、否寧ロ不完全權タル救濟權ヲ以テ之ニ換ヘントスルモノノ如シ。彼即チ説テ曰ク、

All things were originally common. No one being able to produce a charter from Heaven, had any better title to a particular possession than his next neighbour. These were reason for mankind's agreeing upon a separation of this common fund; and God for these reasons is

presumed to have ratified it. But this separation was made and consented to upon the expectation and condition that every one should have left a sufficiency for his subsistence, or the means of procuring it; and as no fixed laws for the regulation of property can be so contrived, as to provide for the relief of every case and distress which may arise, these cases and distresses, when their right and share in the common stock were given up or taken from them, were supposed to be left to the voluntary bounty of those who might be acquainted with the exigencies of their situation, and in the way of affording assistance. And, therefore, when the partition of property is rigidly maintained against the claims of indigence and distress, it is maintained in opposition to the intention of those who made it, and to *His*, who is the supreme Proprietor of everything, and who has filled the world with plenteousness, for the sustentation and comfort of all whom he sends into it. P. 149 et seq.

ペーレーハ權利ノ分類ヲ説イテ左ノ如シトナス。

- (一) 自然權、外來權 natural or adventitious Rights.
- (二) 可離權、不可離權 alienable or inalienable Rights.
- (三) 完全權、不完全權 perfect or imperfect Rights.

自然權トハ政府ナクトモ存スル權利ニシテ本來人間ニ固有ナルモノヲ云ヒ、外來權トハ政府ナクシテハ存セザルモノヲ云フ、例ヘバ、人ノ其生命ニ對スル權、身體及自由ニ對スル權利、勞働ノ成果ニ對スル權利、空氣、光線、水ヲ共同ニ使用スル權利ノ如キハ政府ナクトモ存スル自然權ナリ。之ニ反シテ王ノ臣民ニ對スル權利、將校ノ兵卒ニ對スル權利、裁判官ノ囚人ノ生命、及自由ニ對スル權利ノ如キ、要スルニ一人又ハ一定ノ團體ガ爾餘ノ人間ニ對シ法律、規則ヲ作ル權利ハ何レモ外來權ナリ。可離權トハ財產、家屋、土地及貨幣ニ對スルモノ、不可離權トハ君侯ノ人民ニ對スル權利、夫ノ妻ニ對スル權利、主人ノ僕婢ニ對スル權利ノ如キ是レナリ。完全權トハ實力(force)ヲ以テ確保シ得ルモノ、今日ノ社會ニ在テハ私的實力ニ代ハルニ法律ヲ以テ確保シ得ル權利ヲ云フ、然ル能ハザルモノハ皆不完全權ナリ。人ガ其生命、人格及家宅ニ對スル權ノ如キハ完全權ナリ。貧民ノ救濟權ノ如キハ實力又ハ法律ヲ以テ確保シ得ザルモノナレバ不完全權ナリ。故ニ曰ク、

A poor man has a right to relief from the rich, but the mode, season, and quantum of that relief, who shall contribute to it, or how much, are not ascertained

之ヲ不完全權ト名クルハ語弊ナキニ非ズ、何トナレバ字句ニ拘泥スルモノハ、不完

全權ノ侵害ハ完全權ノ侵害ヨリモ罪輕シト速斷スルノ虞アレバナリ、此解釋ハ全ク根據ナキモノナリ。完全權ト不完全權トノ分ル、所以ハ其執行ニViolenceヲ用キ得ルト得ザルトニアリテ其他ニ分ツ所ナキモノナルヲ知ラザル可カラズト以上ノ區別ヨリモ更ニ肝要ナルハ一般權ト特殊權トノ別是ナリ。ペーレーハ

般權ニ三アリトス。曰ク、

(一) 地球ノ植物、果實ニ對スル權

(二) 動物ノ肉ニ對スル權

(三) 極窮權

是レ萬人ニ共通一般ノ權利ニシテ他ノ權利ハ凡テ特殊權ナリ、一般權ハ常ニ特殊權ニ先ツ。人ハ先ヅ地ノ植物ト動物トヲ得テ其生命ヲ維持スルノ權ヲ有ス。而シテ其不可能ナルトキ第三ノ一般權トシテ極窮權ハ發動ス、其發動ニ關スルペーレーノ所見ハ既述ノ如シ。一般權タル極窮權ノ發動ヲ避クルニハ不完全權タル救濟權ノ確認アリ、否自然權タル生存ノ確保アリ、此等ガ侵害セラレ蹂躪セラルハトキ茲ニ一般權ノ第三種タル極窮權起ルト云フナリ。ペーレー極窮權論ノ要領ハ即チ斯クノ如クナリ。

四

千八百二十六年ヨリ二十七年ニ亘リテ公ケニシタル書簡集「貧民ノ友」ニ於テウ
 ナルアム・コベツトハ更ラニ極窮權ヲ論ズルコト詳ナリ。

予ノ藏本ハ千八百二十七年開板ノ *Cobbett's Poorman's friend*, or a defence of the rights of those who do the work and
 fight the battles ナリ。以下此板本ニヨリテ引ク。フガックススウェル氏ニ從ヘバ此書第一板ノ著題ハ聊カ異ニシテ左ノ如クナ
 リト云フ、此初刊本予ハ見ズ。

Cobbett's Poorman's friend; or, useful information and advice for the working classes; in a series of letters,
 addressed to the working classes of Preston. Nos. I-V, 1st August 1826 to 16th October 1827.

而シテ又タ私藏本ニ後ル、二年(千八百二十九年)ニシテ開板セルモノハ二度著題ヲ改メテ

The Poorman's friend: or, Essays on the Rights and Duties of the Poor. 1829.

トセリト云フ。

彼謂ラク現代(彼レノ時代即チ千八百二十六年頃ヲ云フ)ヲ特色ヅクル凡テノ新
 シキ、奇ナル不自然ナル、怪異ナルモノ、中予ノ見ル所ニテハ「貧民」ト名付ケラルハ
 社會ノ一部ノ状態ト其取扱ニ關スル世上ノ言議ホド怪異ナルモノハナシ。英國
 ノ法律ハ食物ト衣料トノ不足ニ苦ムモノアル可カラズト規定ス。The Law of
 England says, that there shall be no person to suffer from want of food and raiment 英國ノ

法律ハ此種ノ不足ニ苦ム人ナカル可キヲ監視スル爲メニ各教區ニ救貧監督官吏ヲ置ク。法律ハ此等監視官ニ命ジテ曰ク、

“Take care that no person suffer from hunger, or from cold; and that you may be sure not to fail of the means of obeying this my command, I give you, as far as shall be necessary for this purpose, full power over all the lands, all the houses, all the goods, and all the cattle, in your parish.”

又タ司法官ニ命ジテ曰ク、

“Lest the overseer should neglect his duty; lest, in spite of my command to him, any one should suffer from hunger or cold, I command you to be ready to hear the complaint of every sufferer from such a glect; I command you to summon the offending overseer, and to compel him to do his duty.”

國ノ法律ガスク明白ニ命令スルニ拘ラズ今現ニ英國ニ於テ數千ノ人ガ飢餓ニ迫ルヲ聞クハ怪異至極ト云ハズシテ何ゾヤ。

So good, so benignant, so wise, so foreseeing, and so effectual, is this, the very best of all our good old laws! This law, or rather code of laws, distinguishes England from all the

other countries in the world, except the United States of America, where, while hundreds of other English statutes have been abolished, this law has always remained in full force, this great law of mercy and humanity, which says that

no human being that treads

English ground shall perish

for want of food and raiment,

For such poor persons as are unable to work, the law provides food and clothing; and it commands that *work* shall be provided for such as are able to work, and *cannot otherwise get employment*. This law was passed more than two hundred years ago. op. cit. p. 1—9.

英國ハ其特有ノ救貧法ニヨリテ英國ニ住ムモノハ誰人モ飢餓ノ爲メニ死セザル可キヲ保障ス、米國モ亦然リ。是レ兩國ノ他國ニ勝ル所以ニシテ、此法ヲ廢止セントハ金ハ屢々起リタレドモ終ニ成効セズ、此法ハ儼然トシテ現存ス。吾人ノ義務ハ此法ノ不備缺點ヲ補ヒテ其正シク行ハレンコトヲ期スルニアリト。

コベットハ更ラニ論ヲ進メテ曰ク

It is founded in the law of nature and, were it not for the provisions of this law, people would, according to the opinions of the greatest lawyers, have a *right to take* food and raiment sufficient to preserve them from perishing; and that *such taking* would be neither *felony* nor larceny.

右直譯

「英國ノ救貧法ハ實ニ自然ノ法ニ其根據ヲ有スルモノナリ若シ此救貧法微カリヒバ人民ハ——最大法律家ノ説ニ從ヘバ——自己ヲ死ヨリ救フニ要スル食料衣料ヲ取ルノ權ヲ有ス可ク斯ク取ルコトハ強盜罪ヲモ竊盜罪ヲモ構成スルコトナシ」

ト而シテ語ヲ接ギテ曰ク、

This is a matter of the greatest importance; it is a most momentous question; for if it be settled in the affirmative—if it be settled that it is not felony, nor larceny, to take other men's goods without their assent, and even against their will, when such taking is absolutely necessary to the preservation of life, how great, how imperative, is the duty of affording, if

possible, that relief which will prevent such necessity. op. cit. p. 10.

右直譯

「此レ最大重要事項ナリ。此レ最緊切ノ問題ナリ。何トナレバ此一事ニシテ肯定セラレンカ——生命ノ維持ニ絶對的ニ必要ナルトキハ他人ノ財ヲ其同意ナク否其意思ニ反シテスラモ之ヲ取ルコトハ強盜ニモ竊盜ニモ非ズト決定セラレンカ、此クノ如キ必要ノ起ルヲ避クルガ爲メニ出來得ル丈ケ救濟ヲ與フルコトノ義務ハ如何ニ大ニ、如何ニ緊急ナルゾヤ」

サレバ予ハ今冷靜ニ此論ノ肯定セラル可キヤ否定セラル可キヤノ兩端ヲ叩ク可ク古來學者ノ說ク所ヲ周到ニ考查セントスト云ヒテコベツトハ以下法理哲學ノ考究ニ入ル。彼曰ク、

There are some great lawyers who have contended that the starving man is still guilty of felony or larceny, if he take food to satisfy his hunger; but there are a great number of other, and still greater, lawyers, who maintain the right to take, is founded on the law of nature; and it is a saying as old as the hills, a saying in every language in the world, that "self-preservation is the first law of nature." The law of nature teaches every creature to prefer the

preservation of its own life to all other things. p. 10-11.

六

コベットハ先ヅサー・マシユー・ヘールノ説ヲ論ズ。ヘールノ説ハ其著 *Pleas of the Crown* 第九章ニ在リ。ヘール曰ク、

Some of the casuists, and particularly *Corneilius*, Tom I. *De furti et rapine restitutione*, § 3, 4, p. 473; and *Grotius*, *De jure belli ac pacis*, lib. II. cap. 2. § 6, tell us, that in case of extreme necessity, either of hunger or clothing, the civil distributions of property cease, and by a kind of tacit condition the first community doth return, and upon this those common assertions are grounded, '*quicquid necessitas cogit, defendit*' [Whatever necessity calls for, it justifies] '*Necessitas est lex temporis et loci*' [Necessity is the law of time and place]. 'In casu extreme necessitatis omnia sunt communia' [In case of extreme necessity, all things are in common]; and therefore, in such case *theft is no theft*, or at least not punishable as theft, and some even of our own lawyers have asserted the same; and very bad use hath been made of this concession by some of the Jesuitical casuists of France, who have thereupon advised

apprentices and servants to rob their masters, where they have been indeed themselves in want of necessities, of clothes or victuals; whereof, they tell them, they themselves are the competent judges; and by this means let loose, as much as they can, by their doctrine of probability, all the ligaments of property and civil society.

斯クテヘールハ極窮權ヲ全然否認スルモノナリ。次ニ來ルモノハサールウキリアム・ブラクストーンニシテ彼モ亦極窮權ヲ否定ス。之ニ反シテブフェンドルフハヘールガ聖書ヲ引用シテ其論ヲ確メントシタルヲ駁シテ曰ク、ヘール引用ノ舊約聖書箴言第六章第三十、三十一節ノ場合ハ能ク吟味スルトキハ極窮ノ場合ニ非ザルガ故ニ其取ルコトハ竊盜トセラル、ナリト。斯クテコベツトハ此ノ一事例ニ就テヘール說ノ當否ヲ論ズルコト甚ダ詳ナリ。(前掲二十二頁ヨリ二十九頁ニ至ル)

七

グロージアストッフエンドルフトハ極窮權ヲ是認スルモノナリ。グロージアスハ其戦争ト平和ノ權利第二篇第二章ニ云テ曰ク、(私藏本 Hugonis Grotii De Jure belli et pacis, libri tres, accompanied by an abridged

translation by Wm. Whewell, Cambridge, 1853. ユー引ク。)

1. Videamus porro, ecquod jus communiter hominibus competat in las res, quae jam proprietate aliquorum factae sunt: quod quærit mirum forte aliquis putet, cum proprietates videatur absorptis se jus illud omne, quod ex rerum communi status nascebatur. Sed non ita est. Spectandum enim est, quæ mens eorum fuerit, qui primi dominia singularia introduxerunt: quæ credenda estitalis fuisse, ut quam minimum ab æquitate naturali recesserit. Nam si scriptæ etiam leges in eum censum trahendæ sunt quatenus fieri potest, multo magis mores, qui scriptorum vinculis non tenentur.

2. Hinc primo sequitur, in gravissima necessitate reviviscere, jus illud pristinum rebus utendi, tanquam si communes manissent: quia in omnibus legibus humanis, ac proinde et in lege domini, summa illa necessitas videtur excepta.

3.略

4. Nam et inter theologos recepta sententia est, in tali necessitate, si quis quod ad vitam suam necessarium est, sumat aliunde, eum furtum non committere: cujus definitionis non hæc causa est, quam nonnulli adferunt, quod rei dominus ex caritatis regula rem egenti dare tenetur, sed quod res omnes in dominos distinctæ, cum benigna quadam receptione primitivi

juris videantur. Nam si primi divisores interrogati fuissent quid de ea re sentirent, respondissent quod dicimus. op. cit. pp. 237—9.

右直譯

(一) 次ニハ既ニ私有財産ト爲サレタルモノニ就テ果シテ共同權存スルヤ否ヤヲ考フ可シ。或人ハ此提問ヲ不思議ト看做スナラン。何トナレバ私有財産一度設定セラレバ共有狀態ニ於ケル一切ノ權利ハ消滅スルモノト認ムレバナリ。然レドモ是レ誤ナリ。吾人ハ私有財産制度ヲ創設シタル人々ノ意思如何ヲ尋ネザル可カラズ。其意思ハ自然ノ衡平ヨリ出來ル丈ケ遠カラザルモノナラザル可カラズト想定ス可シ。成文法モ出來ル限り自然ノ衡平ニ遠カラザル意味ニ解釋ス可キモノナル以上、成文ニヨリテ拘束セラレザル慣習ニ至ツテハ更ラニ然リト爲サル可カラザルナリ。

(二) 從テ次ノ結論ヲ生ズ。極窮ノ場合ニハ物ノ使用ニ關スル原始權復活シ恰カモ共同所有ノ狀態ニ在ルモノノ如クナル。何トナレバ凡テノ法ニ於テ而シテ又所有權法ニ於テ極窮ハ除外セラレバナリ。

(三) 略之。

(四) 何トナレバ神學者間ニ於テハ極窮ノ場合ニハ人ハ其生命ヲ維持スルニ必要

ナルモノヲ他人ノ所有ヨリ取ルモ決シテ竊盜ヲ行フモノニアラザルコトハ一般ニ受納レタル所ナリ。其理由ハ財産ノ所有者ハ之ヲ要スルモノニ其極要ノモノヲ慈善トシテ與フ可キ義務アルガ爲メニ非ズ。凡テノ財産ハ其極要ノ合ニ於テハ原始權發動ヲ妨グズトノ諒解ノ下ニ於テノ其所有者ニ許容セラレハモノナルニ依ルナリ。蓋シ初メテ財産ノ分割ヲ行ヒタル人々が其意思如何ト問ハルハナラバ必ず上述ノ事ヲ以テ答フ可ケレバナリ。

故ニセネカ曰ク必要ハ人間弱點ニ對スル大ナル免除ニシテ凡テハ法律ヲ打破スルモノナリ、magnum humane imbecillitatis patrociniū, omnem legem frangit ト

プフエンドルフモ亦説テ曰ク、

We conceive, therefore, that such a person doth not contract the guilt of theft, who happening, not through his own fault, to be in extreme want, either of necessary food, or of clothes to preserve him from the violence of the weather, and cannot obtain them from the voluntary gift of the rich, either by urgent entreaties, or by offering somewhat equivalent in price, or by engaging to work it out, shall either forcibly or privily relieve himself out of their abundance, especially if he do it with full intention to pay the value of them whenever his better fortune gives him ability. op. cit. p. 34—6.

コベツト便チ此兩者ニ就テ考究スルコト甚ダ綿密ナリ。

八

極窮權論其モノハ單ニ學說史上過去ノ一現象タルニ過ギズ之ニ反シ極窮權ハ實行ハ陳クシテ而モ猶ホ新ナリ。今日ノ財産擁護本位ノ私法哲學ガ極窮權ノ理論ヲ容レ能ハザルコトハ元ヨリ論ヲ待タズ。然レドモ生活ハ理論ヨリモ強ク且ツ銳シ。理論ノ上ニ於テ極窮權ヲ葬リ去リタリトテ其ガ生活ノ上實際ノ上ニ時トシテ突發スルコトヲ防グコトハ能ハズ。人間存在ノ第一義タル生存ノ保障ノ打破セラレテ之ヲ恢復スルノ見込容易ニ立タザルトキハ理論ニ訴ヘズシテ直覺ニ問ヒ坦々タル大道ヲ往クヲ迂ナリトシテ却テ交通ノ捷徑ヲ見出サンコトヲ勉ム。極窮權ノ實行ヲ絶斷スルノ道ハ唯一曰ク生存權ノ確實ナル保障ヲ第一義トスル政治ト法律ノ確立是レノミ。内閣ノ爭奪政權ノ勝敗ヲ能事トスルモノニシテ眞乎人間ノ生活ニ沒交渉ナル所謂官僚政治又ハ政黨政治所謂立憲政治所謂民主政治ハ如キモノ、論究ニ彷徨スル限り極窮權ハ唯ダ理論ノ上ニ於テノミ否定シ得可シ。生活ノ實際ニ於テ之ヲ拒否スルコトハ到底望ミ得可カラズ。感ズル所アリ。極窮權論考一章ヲ作ル。(七八二四)